

**1032 FELONY MURDER: DEATH CAUSED WHILE COMMITTING A CRIME
AS A PARTY TO THE CRIME: AIDING AND ABETTING — §§ 940.03
and 939.05**

Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing¹ the crime of (name of crime)² as a party to the crime.

State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

Elements of Felony Murder That the State Must Prove

1. The defendant was a party to the crime of (name of crime).
2. The death of (name of victim) was caused by the commission of the (name of crime).³

**Determining Whether the Defendant Was A Party
To the Crime of (name of crime)**

The first element of felony murder requires that the defendant was a party to the crime of (name of crime). This determination has two parts. I will first define what it means to be a party to the crime, which is the first part. Then I will define the elements of (name of crime), which is the second part.

Party To A Crime

“Party to a crime” means that all persons concerned in the commission of a crime may be found to have committed that crime although they did not commit it directly.⁴

The State contends⁵ that the defendant was concerned in the commission of the crime of (name of crime) by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either

- assists the person who commits the crime, or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name of crime), the defendant must know that another person is committing or intends to commit the crime of (name of crime) and have the purpose to assist the commission of that crime.⁶

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

(However, a person does not aid and abet if (he) (she) is only a bystander or spectator

and does nothing to assist the commission of a crime.)

Jury's Decision – Party To A Crime

Before you may find that the defendant was a party to the crime of (name of crime), the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name of crime) or that the defendant intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree as to whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.⁷

Elements of (name of crime) That the State Must Prove

Now I will define the elements of (name of crime).

(Name of crime), as defined in section _____⁸ of the Criminal Code of Wisconsin, is committed by one who (here refer to the instruction for the underlying crime to fully define the elements of that crime).⁹

Determining Whether Death was Caused by the Commission of (name of crime)

The second element of felony murder requires that the death of (name of victim) was caused by the commission of the (name of crime).¹⁰

The Meaning of “Cause”

“Cause” means that the commission of the (name of crime) was a substantial factor in producing the death.¹¹

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A FELONY.¹²

[The phrase “the commission of” the crime includes the period of immediate flight from that crime.]

Jury’s Decision on Felony Murder

If you are satisfied beyond a reasonable doubt that the defendant was a party to the crime of (name of crime) and that the death of (name of victim) was caused by the commission of (name of crime) as that crime has been defined, you should find the defendant guilty of felony murder.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1032 was originally published in 1998 and revised in 2003, 2007, and 2013. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. This revision was approved by the Committee in April 2022; it also reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022].

This instruction tailors Wis JI-Criminal 1030, Felony Murder, to a case based on the defendant’s being party to the felony that caused the death. It integrates material from Wis JI-Criminal 400, Party To Crime: Aiding and Abetting: Defendant Either Directly Committed Or Intentionally Aided the Crime Charged, and Wis JI-Criminal 1030, Felony Murder.

2005 Wisconsin Act 313 amended §940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- §940.204 Battery or threat to health care providers and staff

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new “unclassified felony” under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

The proper way to integrate party to the crime with felony murder was addressed by the Wisconsin Supreme Court in State v. Oimen, 184 Wis.2d 423, 449, 516 N.W.2d 399 (1994):

. . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony.

1. This instruction is for the case where the underlying felony was committed. For a case based on the attempt to commit the underlying felony, this instruction must be adapted to the format provided in Wis JI-Criminal 1031.

2. As amended by Wisconsin Act 209, § 940.03 specifies fourteen statutes defining crimes that can be the basis for a felony murder charge. The fourteen crimes are:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.204 Battery or threat to health care providers and staff
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) “Carjacking”
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

- (a) without consent and causing pregnancy or great bodily harm
- (b) without consent by use or threat of a dangerous weapon or article
- (c) without consent, while aided and abetted and by use or threat of force.

3. “While committing or attempting to commit” is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused “as a natural and probable consequence of the commission of or attempt to commit a felony.” The nature of the connection between the felony and the death has been a source of considerable difficulty in many states which have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin’s statute addresses that problem by specifying a limited number of felonies. Thus, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the crime? Statutes in some states include deaths caused “while fleeing immediately after committing” a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the “immediate flight after committing” the felony (17 A

§ 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: “. . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant’s felony dictated his conduct which led to the homicide.” LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

4. This is a paraphrase of § 939.05(2), which provides: “Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it. . . .”

5. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). If the defendant has not been charged as a party to crime, the material in the second set of brackets should be used.

6. The definition of “intentionally” deals with the clear cut case where the defendant acted with the purpose to assist the commission of the crime charged. “Intentionally” is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis-JI Criminal 923.2. For a case involving the “natural and probable consequences” variation of aiding and abetting, see Wis JI-Criminal 406.

7. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

8. Here include the statute violated, for example: “The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . .” This is the way the first sentence of the uniform instruction for the underlying felony will read.

9. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 904.204(2) Battery or threat to a staff member of a health care facility – Wis JI-Criminal 1247A
- for § 904.204(3) Battery or threat to a health care provider – Wis JI-Criminal 1247B
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405

- for § 943.10(2) Armed Burglary – Wis JI-Criminal 1422
- for § 943.23(1g) “Carjacking” – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

10. See note 2, supra.

11. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with “before”:

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

12. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded “as a matter of law that the phrase in § 940.03, ‘while committing or attempting to commit’, encompasses the immediate flight from a felony.” The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the “mastermind” of an armed burglary which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.